IN THE

Supreme Court of the United States

October Term, 1976

No. 76-663

CHRYSLER MOTORS CORPORATION

and

CHRYSLER CREDIT CORPORATION,

Petitioners,

v.

MARVIN H. GREENFIELD

and

SUPERIOR DODGE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners, Chrysler Motors Corporation ("Motors") and Chrysler Credit Corporation ("Credit"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 26, 1976.

Opinions Below

The opinion of the Court of Appeals for the Fourth Circuit and the District Court for the District of Maryland, neither of which have yet been reported, are annexed hereto as Appendix A and Appendix B, respectively.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was dated July 26, 1976, and entered on the same day. By order entered on September 29, 1976, a timely petition for rehearing *en banc* was denied. By order entered on October 13, 1976, the Court of Appeals granted petitioners' motion for a stay of the mandates pending application for a writ of certiorari. The Supreme Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether it is error and a deprivation of petitioners' right to trial by jury for a federal court to consider and determine a motion for judgment n.o.v. on the basis of proof of a fact submitted in opposition to the motion, but not in the record at the close of evidence and as submitted to the jury for its verdict.

2. Whether the District Court's jury instructions were so hopelessly confusing and so devoid of the barest guidelines for the jury (including application of the Automobile

Dealers' Day in Court Act, 15 U.S.C. §§1221, *et seq.*[1]) as to constitute fundamental and prejudicial error denying petitioners a fair trial and entitling them to a new trial.

Statutes, Constitutional Provisions and Regulations Involved

Federal Rules of Civil Procedure, Rule 50(b), 28 U.S.C.:

> "MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been di-

1. One of the reasons, among others, that the jury instructions were confusing is that the District Court refused to charge that a showing of coercion or intimidation by the manufacturer is necessary to establish bad faith under the Dealers' Day in Court Act. The affirmance by the Court of Appeals of the refusal of the District Court so to charge also creates a conflict, at least in principle, between the Circuits and raises an important federal question which has not been, but should be, settled by the Supreme Court. See pp. 17-18 *infra*.

rected. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Federal Rules of Civil Procedure, Rule 51, 28 U.S.C.:

"INSTRUCTIONS TO JURY: OBJECTION. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

United States Constitution, Seventh Amendment:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Additional statutes cited herein are set forth in Appendix C hereto:

Automobile Dealers' Day in Court Act, 15 U.S.C. §§1221, 1222 and 1223;

Annotated Code of Maryland, Corporations and Associations §3-513 (1975) (formerly Article 23, §85 (1973 Repl. Vol.));

Annotated Code of Maryland, Courts and Judicial Proceedings §5-101 (1974).

Statement of the Case

Petitioner Motors has been held liable to both respondents Superior Dodge, Inc. ("Superior") and Marvin H. Greenfield, sole shareholder of Superior ("Greenfield"), for violation of the Automobile Dealers' Day in Court Act, 15 U.S.C. §§1221, *et seq.*, deceit and tortious interference with contract and petitioner Credit has been held liable to both Superior and Greenfield for deceit and breach of contract [R. 227]. As against both Motors and Credit and as to each ground, the same damages were assessed in the amount of $481,600, of which the jury allocated 24% to Superior and 76% to Greenfield [R. 227].

Suit was commenced by respondents on June 25, 1973 [R. 10]. Jurisdiction was based upon diversity of citizenship, as well as 15 U.S.C. §§1221 and 1222 and the doctrine of pendent jurisdiction [R. 53-54].

The complained-of acts of Motors concern negotiations for an automobile franchise between Greenfield and Motors during late 1969 and early 1970 which led to the formation of Superior and its execution of a Term Sales Agreement ("Dealership Agreement") with Motors, dated January 29, 1970, whereby Superior became an authorized Dodge dealer for a term of 42 months [R. Pls. Ex. 67B], as well as the relations between Superior and Motors under the Dealership Agreement until Superior ceased doing business in late 1970. Motors was alleged to have made misrepresentations during the negotiations that induced Greenfield to cease operating his Dodge dealership in Manassas, Virginia, which was wholly-owned and managed by him since

August, 1968 [R. 251; 2327], in order to become a Dodge dealer in Baltimore, Maryland. The claimed tortious interference with contract consisted of an alleged condition, imposed by Motors upon execution of the Dealership Agreement, that Greenfield would not be permitted to operate at the so-called Hoffman-Green location [R. 307-08; 2720], which Greenfield testified he had already orally agreed to sublease [R. 298-301], but rather would have to operate at the so-called Posner location, which was less desirable both as to facilities and location [R. 307-09]. Superior's written resignation as a Dodge dealer on October 27, 1970, signed by Greenfield [R. Pls. Ex. 52], was alleged to have been coerced by Motors and thus claimed to amount to a termination by Motors in violation of the Dealers' Day in Court Act. In addition, Motors' conduct under the Dealership Agreement was also claimed to violate the Dealers' Day in Court Act.

The complained-of acts of Credit were alleged oral misrepresentations or promises made by Credit's local representative upon the execution of financing agreements between Credit and Motors on March 17, 1970, that Credit would provide a $50,000 line of regular used car wholesale financing ("floor plan") and would accept the return of $25,000 of Credit's $100,000 capital loan as a "prepayment", to be applied to the monthly repayments schedule or re-borrowed with little difficulty as desired by Superior [R. 345-48], and that it would not require Superior to meet the net worth and working capital requirements contained in the financing agreements [R. 449]. According to Greenfield's testimony the financing agreements were not redrafted; to do so would have required resubmission

to Credit's authorized officers in Detroit [R. 346]. The claimed breach occurred during the summer of 1970 when Superior was experiencing financial difficulties and Credit began to require Superior to pay off the floor plan on regular used cars which the local office had granted without a line being established [R. Pls. Ex. 67X; Credit Exs. 18, 19, 108], and later, rather than providing more financial assistance, Credit placed Superior on finance hold for failure to submit required financial statements and to meet net worth and working capital requirements [R. 2317-19].

After the verdict, Motors and Credit moved for judgment n.o.v. which the District Court granted on May 15, 1975 only as against Superior on the grounds Superior lacked capacity to sue when this action was commenced [Appendix B]. The defense of lack of Superior's capacity to sue because its corporate charter had been revoked under Maryland law was raised by the amended answers of Motors and Credit [R. 95-101]. When Motors and Credit moved for a directed verdict, which was denied, and when the case was submitted to the jury, the only evidence in the record as to Superior's status was a letter from the Maryland Department of Assessments and Taxation certifying that Superior's Maryland charter was annulled on April 18, 1973, prior to the commencement of this action [R. Credit Ex. 72]. It was only on Motors' and Credit's motions for judgment n.o.v. that Superior attempted to submit proof that its charter had been revived (and even then the alleged revival was only effected almost a month after the jury verdict had been rendered) [R. 232-34], and argued that under Annotated Code of Maryland, Corpora-

tions and Associations §3-513 (1975) (formerly Article 23, Section 85(d) (1973 Repl. Vol.)), the effect of the revival was retroactive back to the date its charter was revoked. The District Court held that the subsequent revival was irrelevant even if it operated retroactively because the standard for determining the motions for judgment n.o.v. was the same as for determining the motion for a directed verdict and the only evidence submitted to the jury was of the revocation of Superior's charter.

Motors and Credit appealed upon the grounds, among others, that the District Court's jury instructions were improper and prejudicial, and Superior and Greenfield cross-appealed. On July 26, 1976, the Court of Appeals handed down a decision affirming all the rulings of the District Court without discussion, except that it reversed the District Court's granting of Motors' and Credit's motions for judgment n.o.v. against Superior [Appendix A]. The Court of Appeals reversed the judgment against Superior on the basis of the later revival of Superior's charter, a fact which was not in the record submitted to the jury but only contained in post-trial papers [R. 232-34]. The Court of Appeals held that under the Maryland revival statute, as interpreted in *Redwood Hotel, Inc.* v. *Korbien*, 197 Md. 514, 80 A.2d 28 (1951), the effect of the revival of Superior's charter was to reinstate, retroactively, its capacity to sue.

Reasons for Granting the Writ

1. The Court of Appeals' Explicit Reliance Upon Post-Trial Facts Set Forth in Post-Trial Papers in Considering and Determining a Motion for Judgment N.O.V. Raises Important Questions as to the Seventh Amendment Right to Trial by Jury and Proper Procedure Under Rule 50(b) of the Federal Rules of Civil Procedure, and Its Decision Conflicts with the Decisions of Other Courts of Appeals and Its Own Prior Decision Concerning These Questions.

The Court of Appeals expressly relied upon post-trial facts set forth in post-trial papers submitted on behalf of Superior in opposition to petitioners' motions for judgment n.o.v., but not in the record at the close of evidence and as submitted to the jury, in its decision reversing judgment n.o.v. against Superior on the grounds it lacked capacity to sue. In so doing, the Court of Appeals deprived petitioners of their right to trial by jury and its decision conflicts with a prior decision of that court and decisions of other courts of appeals as to the proper procedure under Rule 50(b) of the Federal Rules of Civil Procedure. Important constitutional and procedural questions are thereby raised by the Court of Appeals' decision concerning the role of a federal court under the Seventh Amendment and Rule 50(b) of the Federal Rules of Civil Procedure in considering and determining a motion for judgment n.o.v. These questions have not been, but should be, settled by the Supreme Court.

The proper procedure on a motion for judgment n.o.v. is that the trial court and appellate court may only look at the evidence as presented to the jury:

"On a motion for judgment n.o.v. as on a motion for directed verdict, the district court must determine whether there was sufficient evidence presented to raise a material issue of fact for the jury. 9 C. Wright & A. Miller, Federal Practice and Procedure, Sec. 2521, at 537 (1971). * * * The standard for measuring the legal sufficiency of the evidence is the same both on a motion for a directed verdict and on a motion for judgment n.o.v. Moran v. Raymond Corp., 484 F.2d 1008, 1014 (7th Cir. 1973), cert. denied, 415 U.S. 932, 94 S. Ct. 1445, 39 L. Ed. 2d 490 (1974); *cf.* Minton v. Southern Ry. Co., 368 F.2d 719, 720 (6th Cir. 1966). Furthermore, the standard remains the same when the trial court's decision is reviewed on appeal. *See* Calloway v. Central Charge Service, 142 U.S. App. D.C. 259, 440 F.2d 287, 289 n. 2 (1971); 9 Wright & Miller, Sec. 2524, at 542 (1971)." *O'Neill* v. *Kiledjian,* 511 F.2d 511, 513 (6th Cir. 1975).

In *Midcontinent Broadcasting Co.* v. *North Central Airlines, Inc.,* 471 F.2d 357 (8th Cir. 1973), it was held that the trial court improperly granted a motion for judgment n.o.v. by disregarding evidence it held it had erroneously admitted. At most, it could have granted a new trial.

A court can no more add to the evidentiary record than it can subtract from it. Thus, in *Hawkins* v. *Sims,* 137 F.2d 66, 67 (4th Cir. 1943), the Court of Appeals for the Fourth Circuit refused to consider an affidavit submitted on a motion for judgment n.o.v., as opposed to a motion for a new trial, because:

> "It is well settled that a judgment n.o.v. cannot be granted except where motion for directed verdict has been made, and then only where the motion for directed verdict should have been granted, i.e. where there is no substantial evidence to support the verdict."

Here, where no evidence as to the revival of Superior's charter was in the trial record as submitted to the jury—indeed, its charter was not revived until a month after the jury verdict—such evidence could not properly be considered on the motions for judgment n.o.v. or on appeal. At most, it might provide grounds for a new trial, otherwise it deprives petitioners of their right to trial by jury and the opportunity to meet the new evidence as, *e.g.,* showing the deliberate election of respondents to go to trial and verdict without seeking revival. Under the Seventh Amendment, just as a court cannot grant judgment n.o.v. when it cannot be said that the inference drawn by the jury is without support in the evidence because to do so would deprive the litigants of their right to a jury trial, *Tennant* v. *Peoria & P.U. Ry. Co.,* 321 U.S. 29, 35 (1944), a court cannot grant judgment n.o.v. by adding to the record. *See, Quercia* v. *United States,* 289 U.S. 466, 471 (1933) (trial judge not permitted to add to evidence under guise of commenting upon it).

Redwood Hotel, Inc. v. *Korbien,* 197 Md. 514, 80 A.2d 28 (1951), relied upon by the Court of Appeals as to the effect of the Maryland revival statute, is not relevant. That case did not involve a motion for judgment n.o.v.; indeed, there was no issue raised, much less a finding made, below with respect to the capacity of the corporation to bring suit. There, defendant first raised the issue of capacity on appeal and only with respect to the appeal, not the initiation of suit. Here, both federal procedure on judgment n.o.v. motions and, as a judgment has been imposed

on respondents on facts they had no opportunity to meet at trial, the constitutional right to a jury trial are involved.

Accordingly, the trial court here was correct that the effect of the revival of Superior's charter under the Maryland revival statute could not, after the close of evidence, be considered because the fact of revival was not properly before it. Clearly, if a directed verdict had been granted, or a jury verdict returned, in favor of Motors and Credit on the issue of Superior's capacity, Superior could not thereafter revive its charter and obtain a reversal on appeal. *Redwood* does not so hold, and to so hold would thwart important purposes of the federal procedure rules and constitutional right to jury trial, as well as the Maryland revenue statute, by giving the "corporation" a second chance to cure its delinquency, after the issue of its capacity had not only been raised but decided adversely to the "corporation", after ample opportunity, in a five-week trial, to submit proof of cure.

An important question is thus raised whether the Court of Appeals' consideration of the effect of the revival of Superior's charter was improper under Rule 50(b) of the Federal Rules of Civil Procedure and deprived petitioners of their Seventh Amendment right to a jury trial. The Court of Appeals' decision conflicts with *O'Neill* v. *Kiledjian, supra,* and the cases cited therein, and with the principle of the decision in *Midcontinent Broadcasting Co.* v. *North Central Airlines, Inc., supra,* as well as with the Court of Appeals' prior decision in *Hawkins* v. *Sims, supra.* Each of these grounds justifies the grant of certiorari to review the judgment below.

2. The Decision Below so Far Departs from the Accepted and Usual Course of Judicial Proceedings Under Rule 50(b) of the Federal Rules of Civil Procedure as to Deprive Petitioners of Their Right to Trial by Jury and to Call for an Exercise of the Supreme Court's Power of Supervision.

For the reasons set forth in Point 1 above, the Court of Appeals so far departed from the accepted and usual course of judicial proceedings in expressly relying upon post-trial facts set forth in post-trial papers in its decision reversing judgment n.o.v. in favor of petitioners against Superior as to call for an exercise of the Supreme Court's power of supervision.

3. The Court of Appeals' Affirmance Without Discussion of the District Court's Hopelessly Confusing Jury Instructions That Failed to Provide the Barest Guidelines to Aid the Jury Sanctioned so Drastic a Departure by the District Court from the Accepted and Usual Course of Judicial Proceedings as to Deprive Petitioners of a Fair Trial and to Call for an Exercise of the Supreme Court's Power of Supervision.

Jury instructions may be so hopelessly confusing or so devoid of guidance for the jury, and be such a drastic departure from the accepted and usual course of judicial proceedings, as to call for the exercise of the Supreme Court's power of supervision. *See Gibson* v. *Lockheed Aircraft Service, Inc.,* 350 U.S. 356 (1956). Here, the jury instructions [R. 2772-98] depart so drastically from the accepted and usual course of judicial proceedings as to deprive petitioners of a fair trial. *See Capital Traction*

Company v. *Hof*, 174 U.S. 1, 13-14 (1899); *Tyler* v. *Dowell, Inc.*, 274 F.2d 890, 897 (10th Cir.), *cert. denied*, 363 U.S. 812 (1960), and cases cited therein. Manifestly, the exercise of the Supreme Court's supervisory powers is called for.

The issues involved in Greenfield's and Superior's action against Motors and Credit were submitted to the jury in such an undifferentiated manner that it both was impossible for the jury to give due effect to the applicable law and is now impossible to understand what the jury found. The most serious examples are briefly summarized as follows:

—No distinction was made between two of the causes of action under the Dealers' Day in Court Act, 15 U.S.C. §§1221, *et seq.*—bad faith termination and failure to act in good faith in performing or complying with the terms of a dealership's franchise—even though the causes may accrue at different times and the measures of damages are different.

—Similarly, the jury was not instructed to consider separately or specify which of the complained-of acts of Motors and Credit it found to be misrepresentations, tortious interferences with contractual relations or breaches of contract, even though a suit for some such acts would have been barred by the statute of limitations and the measures of damages vary considerably depending on the theory applied, and as to Credit the theories of liability were inconsistent;

—No real distinction was made between Greenfield and Superior by the trial court [R. 227; 2783-87]. Thus, the

jury was required to find for both respondents if it found for either, even though alleged misrepresentations by Motors and the alleged tortious interference occurred before Superior came into existence, the Dealers' Day in Court Act claim accrued only to Superior and any claim based upon the alleged acts of Credit could only accrue to Superior;

—The jury was instructed that the measure of damages was the same for *any* wrong it found—namely, all the profits Superior would have earned had it stayed in business. However, such measure of damages is clearly inappropriate for some of the alleged wrongs—for example, bad faith acts under the Dealership Agreement prior to termination or minor misrepresentations.

The Dealers' Day in Court Act creates two distinct kinds of causes of action, one for failure to act in good faith in performing or complying with the franchise and another for failing to act in good faith in terminating the franchise. *American Motors Sales Corporation* v. *Semke*, 384 F.2d 192, 194, 199 (10th Cir. 1967). The statute of limitations for both is three years, 15 U.S.C. §1223. A cause of action for failure to act in good faith in performing or complying with the terms of the franchise accrues when such a failure occurs, just as a cause of action for failure to act in good faith in terminating a dealership agreement accrues when *that* failure occurs. *Hanley* v. *Chrysler Motors Corp.*, 433 F.2d 708, 711 (10th Cir. 1970).

Here, Superior, by Greenfield, resigned its dealership in October, 1970 [R. Pls. Ex. 52], but respondents contend that this resignation was coerced, and thus amounts

to a bad faith termination by Motors by virtue of a course of conduct engaged in by Motors, which at the same time comprises bad faith in performing or complying with the terms of the franchise. Although each of the acts alleged by respondents may constitute a separate cause of action under the Dealers' Day in Court Act for bad faith in performing or complying with the terms of the franchise, respondents emphasized their theory of a course of conduct resulting in a forced resignation and amounting to a bad faith termination. There are two reasons why respondents did this. First, most, if not all, of the alleged acts of bad faith in performing or complying with the terms of the Dealership Agreement occurred more than three years prior to the commencement of the action and thus are barred by the statute of limitations if sued on alone. But respondents contend that the resignation, which occurred within three years of the commencement of their action, was coerced, and further argue (although petitioners believe incorrectly) that the bar of the statute of limitations is thereby avoided. Second, the measure of damages for bad faith in terminating has been held to be the profits the dealership is prevented from earning by virtue of the termination. *American Motors Sales Corporation* v. *Semke, supra,* whereas the measure of damages for any particular act of bad faith not amounting to a termination would be very different (see below).

Here, the jury instructions hopelessly intertwined the two theories of recovery under the Dealers' Day in Court Act which needed to be clearly differentiated in order to apply a proper measure of damages and the statutes of

limitations. The entire instruction on respondents' claim under the Act was:

> "The statute under which the first count is brought against Chrysler Motors provides that an automobile dealer may bring suit against any automobile manufacturer to recover damages allegedly sustained by reason of the failure of the manufacturer to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, cancelling, or not renewing the franchise." [R. 2783].

The jury was instructed that it could find liability for lack of good faith in Motors' performance *or* its termination, but was asked to determine only whether Motors was liable under the Act [R. 227]. Clearly, solely from its affirmative answer, it is impossible to tell whether the jury found Motors liable for one *or* more particular acts of bad faith, in performing *or* in terminating, *or* for a course of conduct amounting to a bad faith termination.

Moreover, the District Court refused to charge the jury as to the meaning of "good faith" and "bad faith" under the Dealers' Day in Court Act. Any act, even if a breach of a dealership agreement, or a tort against a dealer, does not violate the Dealers' Day in Court Act, unless "bad faith" (*see* 15 U.S.C. §1221(c)) is shown, which, the courts have held, requires, as a separate element, a showing of coercion or intimidation by the manufacturer. *Fray Chevrolet Sales, Inc.* v. *General Motors Corp.,* 536 F.2d 683 (6th Cir. 1976); *Ed Houser Enterprises, Inc.* v. *General Motors Corp.,* —— F.Supp. ——, 1976-1 Trade Reg. Rep. ¶60,845 (S.D. Ill. 1976) and cases cited therein. The Court of Appeals' approval of the District Court's refusal so to charge

flies in the face of the Court of Appeals' approval of that statement of the law in *McGeorge Car Co.* v. *Leyland Motor Sales, Inc.*, 504 F.2d 52 (4th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975), creates a conflict, at least in principle, between the Circuits, and raises an important federal question which has not been, but should be, settled by the Supreme Court.

The prejudice from the District Court's jumbling of claims under the Dealers' Day in Court Act was compounded by the instructions on damages:

> "The measure of damages to be applied in all five counts is the same. The objective is to put the Plaintiffs as nearly as possible in the position they would have occupied but for the Defendants' wrongful conduct. The Plaintiffs, therefore, may recover the benefits of their bargain, that is to say, that they are entitled to all the profits the dealership would have earned but for the wrongful acts of the Defendants.
>
> "The profit period is to be considered as limited to the lesser of the life or work expectancy of Mr. Greenfield, and you may further reduce the period of recoverable profits if you believe, based on the evidence, that for business or other reasons the dealership would have been in operation for a period of time less than Mr. Greenfield's projected work expectancy." [R. 2791-92].

Thus, the jury may have found, as respondents claimed, that Motors failed for seven months to furnish Superior with one type of outdoor sign [R. 437-38], that this constituted bad faith in performing or complying with the terms of the Dealership Agreement and that this was the sole basis for its holding Motors liable under the Dealers'

Day in Court Act.[2] But, clearly, the measure of damages for such violation cannot be all the profits the dealership would have earned if it remained in business for the entire period of Greenfield's work expectancy. In the first place, that is one measure of termination damages, *not* of bad faith in performance. Second, it is a manifest injustice to hold Motors for $480,000 in damages for a failure for several months to install an outdoor sign at Superior when there already was a temporary sign on the building [R. 2405-06; Motors Ex. 21].

The same defects are contained in the instructions with respect to the deceit causes of action against both Motors and Credit. Although several misrepresentations were alleged, the jury was not required to consider separately or specify the basis on which it found liability [R. 227; 2785-87]. Since the misrepresentations occurred more than three years prior to the commencement of plaintiffs' action, and all, or virtually all, were barred by the three-year Maryland statute of limitations for fraud (Annotated Code of Maryland, Courts and Judicial Proceedings §5-101), the jury may have found Motors and Credit liable on claims which are time-barred, especially as they were not instructed on timeliness. Also, the measure of damages the trial court instructed the jury to apply to the deceit causes as well as to all other causes—namely, the profits Superior would have earned if it had not ceased doing business—is clearly unrelated to wrongs the jury could have found. Finally, all

2. Such a finding would be improper, of course, under *Fray Chevrolet Sales, Inc.* v. *General Motors Corp., supra; Ed Houser Enterprises, Inc.* v. *General Motors Corp., supra;* and *McGeorge Car Co.* v. *Leyland Motor Sales, Inc., supra,* but under the District Court's instructions is possible.

of the alleged misrepresentations by Motors were made to Greenfield—some of them before Superior came into existence—but the jury was required to find in favor of both Greenfield and Superior if it found Motors liable for deceit [R. 227; 2786].

One alleged misrepresentation made by Motors to Greenfield was that he would be permitted to locate his Baltimore dealership at the so-called Hoffman-Green location, and in reliance thereon he agreed to give up his dealership in Manassas, Virginia [R. 289-94]. Respondents' claim that this was relied upon by Greenfield is absurd since he admits being told on December 13, 1969, that he would not be permitted to locate there [R. 307-08; 2720], and he did not sign an agreement disposing of his Manassas dealership until January 13, 1970 which *even then* was conditioned upon his obtaining a Dodge dealership in Baltimore and concluding a satisfactory lease arrangement there [R. Motors Ex. 5]. All these events occurred over three years before suit and are time-barred by Section 5-101.

The inapplicability of the instruction that the measure of damages for all causes of action was all profits Superior would have earned if it stayed in business is apparent. Lost profits of Superior after October, 1970 at its then location bear no real relation to a misrepresentation to Greenfield that in 1969 a proposed dealership could have been located at a different facility. Thus, there remains unanswered the question what damages specifically resulted from the difference in location.

Respondents' breach of contract claim against Credit was so hopelessly confused with their misrepresentation claim against Credit that the jury found both deceit and breach of contract against Credit under circumstances in which the evidence could only establish the existence of one or the other. The evidence against Credit was of oral representations as to regular used car floor planning and the effect of Superior's immediate repayment of $25,000 of the capital loan [R. 345-48], and as to Credit's not requiring Superior to meet the net worth and working capital reqairements set forth in the written agreements between them [R. 449]. Assuming the jury found these were not mere opinions, the alleged representations either misled Superior as to Credit's intention and were thus fraudulent in nature, *or* they were true statements of that intent and were thus promissory. The only way one verdict can stand is to disregard the other; it cannot be both ways. What the jury needed, but did not get, in order to avoid this confusion were instructions as to when a statement of fact, expectation or intent is a representation, a promise or neither. By virtue of the District Court's failure to give such instructions, consideration by the jury of Credit's statute of limitations defense to the deceit claim was foreclosed. In addition, Credit's defense to the breach of contract claim that parole evidence may not be used to vary the terms of a written agreement was foreclosed by the District Court's terse instruction that parole evidence (which it did not even define in lay terms) could be used to show "the true nature and character of the transaction" [R. 2781] and its refusal to elaborate [R. 2812-13].

The loss-of-profits measure of damages was clearly improper with respect to the breach of contract claim against

Credit. Recovery of lost profits from a lender for failure to lend money is considered speculative and is unavailable for new, untried ventures such as the big city dealership that Superior was. *St. Paul at Chase Corp.* v. *Manufacturers Life Ins. Co.*, 262 Md. 192, 278 A.2d 12, *cert. denied*, 404 U.S. 857 (1971).

The alleged torticus interference by Motors with contract relates also to the Hoffman-Green facility. Respondents claim that Motors' refusal to permit Greenfield to locate a dealership at the Hoffman-Green location tortiously interfered with contract rights he had with respect to that facility. The loss-of-all-profits measure of damages is as improper for this claim as it was improper for the misrepresentation claim and breach of contract claim and the trial court excluded evidence of the only conceivable measure, the difference between the expected profits at the two locations [R. 2097-98]. Since this cause accrued in December, 1969, and the statute of limitations is three years (Annotated Code of Maryland, Courts and Judicial Proceedings, §5-101), it is also time-barred.[3]

3. The tortious interference with contract claim is completely without merit in any event. Motors had the right before entering into a new dealership agreement with Greenfield to approve the location of Greenfield's dealership. Even if it had previously approved the Hoffman-Green location, it had the right to change its mind until it had entered into an agreement with Greenfield or Superior. Greenfield's remedy for such conduct by Motors was not legal, but was simply not to leave Manassas, Virginia. There was at that time nothing committing him to dispose of his Manassas facility or to lease the Hoffman-Green facility. Nor, on the other hand, did Motors' refusal to approve the Hoffman-Green facility prevent Greenfield from utilizing that facility for any purpose he wished, except he could not compel Motors to authorize a Dodge dealership there.

In addition to these and other specific defects, the trial court's undifferentiated jury charge and verdict form forced the jury to decide this case on the basis of their subjective reaction to respondents' claims, not on the basis of an analysis of legal causes of action. Thus, no attempt was made by the trial court to instruct the jury that certain acts may be considered for one purpose, such as proving coercion in obtaining a resignation in violation of the Dealers' Day in Court Act, but not for other purposes, such as proof of a misrepresentation or bad faith in performing or complying with the Dealership Agreement, because of the bar of the statute of limitations.

This is also particularly true with respect to damages, where the jury awarded over $480,000 when, during its nine months of operations, Superior made a profit in only one month [R. Pls. Ex. 138, at 290, 294, 298, 302]. Assuming that, for certain causes of action, lost profits are a proper measure of damages, the instructions to award all the profits Superior would have earned during the period of Greenfield's work expectancy led inevitably to this excessive award. Respondents' expert testified that Greenfield's work expectancy was 17.2 years [R. 2109][4]. Yet, Superior was only in existence for nine months and the dealership operated by Greenfield previously in Virginia was only in operation for about 15 months. The vague instruction that the profit period could be lessened if the jury believed "for business or other reasons the dealership would have been in operation for a [shorter] period of time" [R. 2791-92] was wholly inadequate. The Court should have instructed the jury that Greenfield's dealerships had only operated

4. Division of the verdict of $481,600 by 17.2 years yields exactly $28,000.

for short periods of time, and, as requested by Motors [R. 225-26; 2809-10], that the profit period should be limited to at most 90 days since, at the time Greenfield resigned, Motors could have terminated Superior on 90 days' notice under the Dealership Agreement [R. Pls. Ex. 132, at 270] because of Greenfield's conviction of a felony [R. 479-80]. When a contract is terminable on notice, the period for which damages are recoverable is limited to the notice period. *Enterprise Wheel & Car Corp.* v. *United Steelworkers,* 269 F.2d 327, 331 (4th Cir. 1959), *rev'd on other grounds,* 363 U.S. 593 (1960). *Cf. McGeorge Car Co.* v. *Leyland Motors Sales, Inc., supra.* The trial court's refusal to let the jury consider Motors' right to terminate because of Greenfield's felony conviction or other grounds now affirmed by the Court of Appeals either contravenes this principle or constitutes a finding of waiver as to which Motors was deprived of its right to a trial by jury.

Finally, the District Court charged the jury to make an allocation of damages between Superior and Greenfield, without saying why, how, or on what basis, that allocation should be made [R. 2793]. In addition to not telling the jury what criteria to use, the charge implied that Greenfield, the sole shareholder of Superior, had a right with respect to each claim to recover damages independent of any right of Superior's. This was error, since a stockholder may not seek individual damages for a wrong done to a corporate dealership. *Henry* v. *General Motors Corp.,* 236 F. Supp. 854 (N.D.N.Y.), *aff'd,* 339 F.2d 887 (2d Cir. 1964). That rule assures that causes of action, like other assets, should be used first to satisfy the claims of various creditors of the corporation; the stockholder is only entitled to the remainder. It is Superior's loss of profits to which the District Court referred in its charge, and Superior, not Greenfield, is no longer in the automobile business [see, R. 247]. Furthermore, nothing in the record shows Greenfield to be the direct victim of any wrong perpetrated by Credit—deceit or breach of contract—since at the time of the alleged misrepresentation or promise Superior was already in existence.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion herein of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ROBERT EHRENBARD
350 Park Avenue
New York, New York 10022
Counsel for Petitioners

November 10, 1976

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-1841

Chrysler Credit Corporation, a body corporate of the State of Delaware,

Appellee,

v.

Superior Dodge, Inc.,

Appellant.

No. 75-1842

Superior Dodge, Inc., and Marvin H. Greenfield,

Appellees,

v.

Chrysler Credit Corporation,

Appellant,

and

Chrysler Corporation, Chrysler Motors Corporation, Chrysler Financial Corporation, Chrysler Realty Corporation, and Chrysler Leasing Corporation,

Defendants.

Appendix A

No. 75-1843

Superior Dodge, Inc., and Marvin H. Greenfield,
Appellees,

v.

Chrysler Motors Corporation,
Appellant,

and

Chrysler Corporation, Chrysler Credit Corporation, Chrysler Financial Corporation, Chrysler Realty Corporation, and Chrysler Leasing Corporation,
Defendants.

No. 75-1844

Superior Dodge, Inc., and Marvin H. Greenfield,
Appellants,

v.

Chrysler Motors Corporation and
Chrysler Credit Corporation,
Appellees.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

Appendix A

Argued March 1, 1976. Decided July 26, 1976

Before BUTZNER, Circuit Judge, FIELD, Senior Circuit Judge, and WIDENER, Circuit Judge.

George W. Miller (Frank F. Roberson, Hogan and Hartson on brief) for Chrysler Motors Corporation; Fenton L. Martin (Clapp, Somerville, Black & Honemann on brief) for Chrysler Credit Corporation; Robert F. Wood (Walter E. Laake, Jr., Kaplan, Smith, Joseph, Greenwald & Laake on brief) for Marvin H. Greenfield and Superior Dodge, Inc.

BUTZNER, Circuit Judge:

These appeals and cross appeals arise out of suits brought on franchise and credit contracts between Chrysler Motors Corporation and Chrysler Credit Corporation, on the one hand, and, on the other, Marvin H. Greenfield and his wholly owned corporation, Superior Dodge, Inc.

The jury found that Chrysler Motors had violated the Dealer's Day in Court Act, 15 U.S.C. §1221 et seq., and was liable for fraud and tortious interference with contract. It also found Chrysler Credit liable for fraud and breach of contract. It awarded Superior Dodge $115,584.00 and Greenfield $366,016.00 damages against both Motors and Credit.

On the consolidated case, the jury found Superior, Greenfield, and his wife liable to Chrysler Credit in the amount of $66,653.02 on a promissory note.

All of the parties moved for judgment notwithstanding the verdict. The district court granted Motors' and Credit's motions against Superior on the ground that its charter had been revoked and it lacked capacity to sue. The court denied all other motions.[1]

The parties have assigned numerous grounds of error. Motors and Credit assert that the evidence was insufficient to sustain the verdict, that the court improperly admitted certain evidence, and that it erred in its instructions to the jury. Motors contends that the statute of limitations bars Greenfield's recovery against it. The Greenfields and Superior charge that the court erred in instructing the jury with respect to Credit's claim against them on the promissory note. Regarding their suit against both Motors and Credit, they complain the court erred by not instructing the jury that they could award punitive damages and by granting judgment against Superior notwithstanding the verdict in its favor.

Upon consideration of the briefs, record, and oral argument, we affirm all the rulings of the trial court except its grant of Motors' and Credit's motions for judgment n.o.v. against Superior. Only this ruling merits extended discussion.

On April 18, 1973, Maryland forfeited Superior's charter for failure to pay taxes. On November 18, 1974, the district court granted Motors' and Credit's motions to

1. Before trial the court severed counts charging that Motors and Credit had violated the anti-trust laws. After ruling on the motions for judgment n.o.v., the court entered final judgment on the issues that had been tried by the jury and certified this appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

amend their answers to raise the issue of capacity to sue. At trial Credit introduced into evidence a letter from the Maryland Department of Assessment and Taxation certifying that Superior's charter had been annulled; Superior introduced no contradictory proof. At the conclusion of all the evidence, Motors and Credit moved for a directed verdict on a number of grounds, including Superior's lack of capacity. The court denied the motion and did not submit this issue to the jury. The jury then returned a verdict in favor of Superior, and on December 30, 1974, the court entered judgment on the verdict. While the motion for judgment n.o.v. was pending, Superior paid the corporate taxes that were due and revived its charter on January 31, 1975.

The district court decided the motion for judgment n.o.v. on May 15, 1975. It ruled that the revival of the charter was of no consequence. It reasoned that under the amended pleadings the issue of Superior's capacity was an issue of fact, and, since Superior introduced no proof of its capacity during the trial, the jury's verdict in its favor was unsupported by the evidence. It therefore amended its judgment to provide that Superior should recover nothing from Motors and Credit.

Federal Rule of Civil Procedure 17(b) provides: "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." The rule simply codifies the well established principle that the issue of a corporation's capacity to sue is a question of substantive law. *See* Oklahoma Natural Gas Co. v. Oklahoma, 273 U.S. 257, 259-60 (1927); 6 Wright and Miller, Federal

Practice and Procedure §1561 (1971). Superior is a Maryland corporation. Under Maryland law the effect of revival is to

> ". . . validate all contracts, acts, matters and things made, done and performed within the scope of its charter by the corporation, its officers and agents during the time when the charter was void, with the same force and effect and to all intents and purposes as if the charter had at all times remained in full force and effect. All real and personal property, rights and credits of the corporation at the time its charter became void and of which it was not divested prior to such revival shall be vested in the corporation, after such revival, as fully as they were held by the corporation at the time its charter became void."[2]

This statute, as interpreted by the Maryland Court of Appeals in Redwood Hotel, Inc. v. Korbien, 197 Md. 514, 80 A.2d 28 (1951), requires reversal of the district court's judgment n.o.v. for Motors and Credit.

In 1949 Redwood Hotel, Inc., forfeited its charter. The next year, it filed a petition in equity, which was dismissed for reasons other than the corporation's lack of capacity. While its appeal from the order of dismissal was pending, Redwood revived its charter. Its opponent Korbien argued that the appeal should be dismissed on the ground that Redwood's charter had been forfeited before it filed the petition, so it lacked capacity to sue. The Maryland Court of Appeals denied the motion to dismiss, because the statute

2. 2B Ann. Code of Md. Art. 23 §85(d) (1973 Repl. Vol.). The statute was revised, without substantive change, in 1975, *see* Ann. Code of Md., Corporations and Associations, §3-513 and Revisor's Note (1975).

retroactively validated the capacity of the corporation to sue through the revival of its charter pending appeal.

The district court did not advert to *Redwood,* and Motors and Credit seek to distinguish it by pointing out that the hotel corporation's lack of capacity to sue was not raised at trial. For this reason, they argue, *Redwood* deals only with the capacity of a Maryland corporation to appeal when its charter has been revived. Additionally, they say, when lack of capacity is pleaded in accordance with Federal Rule of Civil Procedure 9(a), the denial raises an issue of fact which must be resolved before verdict.[3]

We do not read *Redwood* or Rule 9(a) as narrowly as Motors and Credit. *Redwood* deals with a corporation that lacked capacity to sue at the time it filed suit. Like Superior, it did not revive its charter until after judgment. The Maryland Court of Appeals noted that since the corporation was in existence at the time the appeal was heard, the case should be decided on the merits. *Redwood* teaches that the Maryland statute should be applied to validate a corporation's revived capacity to sue until the case is

3. Fed. R. Civ. P. 9(a) provides:

> "It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge."

In view of our disposition of the case, we need not reach Superior's additional claim that Motors did not comply with Rule 9(a) and that Credit is estopped from asserting lack of capacity because it brought suit against Superior.

finally decided on appeal. Consequently, the district court should have considered all of the circumstances existing at the time it decided the motion for judgment n.o.v., including the effect that Maryland law attributes to the revival of the corporate charter.

Rule 9(a) does not require a different conclusion, for it only tells how the factual issue of a corporation's capacity must be raised. Rule 17(b) prescribes how the issue, once raised, should be decided. Applying Rule 17(b), we must give full retroactive recognition to the revival of Superior's charter after judgment. To interpret Rule 9(a) as requiring revival before judgment would compromise the policy of deference to state law which underlies Rule 17(b). Therefore, following *Redwood,* we hold that the January 31, 1975, revival of Superior's charter validated its capacity to sue during the period the charter was revoked.

The judgment is affirmed in part and vacated in part, and the case is remanded for the reentry of judgment in favor of Superior against both Motors and Credit, together with its costs. Superior shall recover its costs on this appeal, and the other parties shall bear their own costs.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil No. 70-1396-Y

CHRYSLER CREDIT CORPORATION

v.

SUPERIOR DODGE, INC., et al.

Civil No. 73-646-Y

SUPERIOR DODGE, INC., et al.

v.

CHRYSLER CORPORATION, et al.

MEMORANDUM AND ORDER

The litigation in question here has been pending before this Court for over four years. It has thus far consumed 36 days of court time in trial, and the pleadings and associated papers fill a filing cabinet drawer in the Clerk's office. The parties now give the appearance of digging in for a siege of the court house with an initial verbal bombardment that adds little to the substance of the case.

One might have thought that when the jury rendered its verdict, at least one of the parties to this action would have been satisfied; not so. The jury's verdict merely transformed what had been a steady stream of paper into a deluge as first Chrysler Credit filed a 9 page motion for a judgment n.o.v., accompanied by an 18 page memorandum, then Chrysler Motors entered the arena with a 4 page motion and a 48 page memorandum. Not to be outdone, Superior Dodge filed a modest 3 page motion and a 3 page memorandum for a judgment n.o.v. in Civil No. 70-1396-Y, apparently holding its fire for the 88 page memorandum in opposition which it filed in Civil No. 73-646-Y. Replies and counter-replies have spawned further additions to the archives of the Court.

This Court does not measure the merit of legal arguments by the reams of paper consumed in advocacy. The exotic amalgam of doctrinal tidbits assembled in the parties' motions and replies invite the Court to digest the record and come forward with a restatement that will tie all which has gone before into a neat conceptual package. The invitation is declined. The record must speak for itself with regard to the decisions made. Therefore, only those aspects of the pending motions which clearly require present determination will be discussed.

In Civil No. 70-1396-Y, defendants Superior Dodge, Inc., and Marvin and Betty Greenfield move for a judgment notwithstanding the verdict rendered against them in the action brought by Chrysler Credit. A review of the transcript, trial notes, and the minutes of the Deputy Clerk reveals that while Superior Dodge offered a motion for a directed

verdict against Chrysler Credit at the conclusion of all the evidence with regard to Civil No. 73-646-Y, no such motion was made with regard to Civil No. 70-1396-Y. Fed. R. Civ. P. 50(b), which governs motions for judgments notwithstanding the verdict, specifically requires that "a motion for a directed verdict [be] made at the close of all of the evidence" as prerequisite to a motion for judgment notwithstanding the verdict. The requisite motion not having been made, the motion notwithstanding the verdict of defendants Superior Dodge and Marvin and Betty Greenfield, in Civil No. 70-1396-Y, must be denied. The Court also finds no merit in the new trial aspect of the defendants' motion.

Chrylser Credit and Chrysler Motors have moved for judgments notwithstanding the verdicts rendered against them in Civil No. 73-646-Y. Of the various bases for the motions advanced by the defendants, only one has any merit—the question of Superior Dodge's capacity to sue.

The defendants' argument, with regard to plaintiff corporation's capacity to sue, begins with the assertion that the capacity issue was effectively raised in accordance with Fed. R. Civ. P. 9(a) when, pursuant to defense motions, this Court, on November 18, 1974, permitted the defendants to amend their answer to the plaintiffs' complaint by specific negative averment with supporting particulars to the effect that the corporation had forfeited its charter prior to instituting Civil No. 73-646-Y and that, in accordance with Maryland law, such a forfeiture deprived it of its capacity to sue in an action brought subsequent to the forfeiture. The defendants, at the close of all the evi-

dence, requested a directed verdict on the capacity issue. The motions were not granted, and, pursuant to Rule 50(b), the action was submitted to the jury subject to a determination by the Court of the legal issues raised by the directed verdict motion.

The plaintiff corporation's response is to argue first that the Court erred in granting the defendants' motion to amend. The Court rejects that argument in light of the liberal amendment policies inherent in Fed. R. Civ. P. 15. Second, the plaintiff notes that on January 31, 1975, subsequent to trial and the jury's verdict, the plaintiff's corporate charter was revived. The plaintiff draws the Court's attention to Md. Ann. Code art. 23, §85(d) (1973 Repl. Vol.) which declares:

> (d) *Effect of revival.*—Such revival of the charter of the corporation shall validate all contracts, acts, matters and things made, done and performed within the scope of its charter by the corporation, its officers and agents during the time when the charter was void, with the same force and effect and to all intents and purposes as if the charter had at all times remained in full force and effect. All real and personal property, rights and credits of the corporation at the time its charter became void and of which it was not divested prior to such revival shall be vested in the corporation, after such revival, as fully as they were held by the corporation at the time its charter became void. . . .

The plaintiff argues that, under Maryland law, the charter revival restores the capacity of the corporation to sue, reinstating that capacity as of the time when the charter was forfeited.

Unfortunately for the plaintiff corporation, its argument on the peculiarities of Maryland corporation law is somewhat beside the point. Once a defendant effectively raises the question of plaintiff's capacity in accordance with Rule 9(a), the existence, or lack, of capacity to sue on the part of the plaintiff becomes an issue of fact. *See* 5 C. Wright & A. Miller, Federal Practice and Procedure, Civil §1294, at 395 n.31 and accompanying text (1969). In effect, the presumption of capacity created by Rule 9(a) is lost, and the factual determination of capacity becomes an issue which the plaintiff must prove by a preponderance of the evidence just as he must prove by a preponderance of the evidence all other facts material to his cause of action. *See* 2A J. Moore, Federal Practice ¶9.02, at 1915 (2d ed. 1974). Where, as here,* the defendant has effectively put the capacity question in issue by the specific negative averment which Rule 9(a) requires to be raised in the defendant's answer, the plaintiff has the burden of proving his capacity. Whether he has met that burden is a question of fact, which,

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* Defendants Chrysler Credit and Chrysler Financial amended paragraph 3 of their Answer to read: "Defendants admit the [plaintiffs'] allegations of paragraph 3, except that they deny that Superior Dodge, Inc., presently is a Maryland corporation or that it has any principal place of business, for reason that its corporate charter was annulled on April 18, 1973 and since such time it has lacked capacity to perform any corporate act, including the institution of this suit." *See* Chrysler Credit and Financial Motion to Amend Answer of August 6, 1974, at 2. The Motion to Amend of the remaining Chrysler defendants was less precise in that those defendants merely denied "that plaintiff Superior Dodge, Inc., is presently a Maryland corporation or that it has any principal place of business." *See* Chrysler Corporation, Motors, Realty and Leasing Motion to Amend of August 19, 1974, at 1. When placed in context with the Chrysler Credit motion, the Motors motion does meet the negative averment requirements of Fed. R. Civ. P. 9(a).

like all other questions of fact, is submitted to the jury only so long as there has been an evidentiary showing sufficient to survive a directed verdict motion. Since the standard for determining a judgment notwithstanding the verdict is, under Rule 50(b), the same as that for a directed verdict motion, *see* 9 C. Wright & A. Miller, Federal Practice and Procedure, Civil §2537, at 599 (1971), the Court, in ruling on such a motion, will view the evidence admitted at trial in the light most favorable to the party against whom the motion is made and give that party the benefit of every reasonable inference. *See Shelton* v. *Jones,* 356 F.2d 426 (4th Cir. 1966). Such a determination is easily made in the instant case because the plaintiff offered no evidence whatsoever on the capacity issue. That would be reason enough for this Court to find that there was not sufficient evidence for the jury to conclude that the plaintiff corporation had carried its burden of proving its capacity to sue. The Court need not rest on that point alone, however, since the defendants, on December 10, 1974, offered, and the Court received into evidence, Chrysler Credit and Chrysler Financial Exhibit No. 72, the Maryland Department of Assessments and Taxation letter certifying that Superior Dodge, Inc.'s Maryland charter was annulled on April 18, 1973. Thus, not only did plaintiff corporation offer no evidence in support of the existence of its capacity, which defendants had effectively brought into question, but the only evidence which went to the jury was Exhibit No. 72—an unimpeached document attesting to the fact that Superior Dodge, Inc., had lost its charter.

There being no evidence to support the plaintiff on the capacity issue, and strong evidence that the corporation

lacked capacity to sue, the jury had nothing before it to justify a finding of fact for plaintiff corporation on the capacity issue. Since, as a matter of law, the jury could not find that the plaintiff corporation had capacity to sue, its verdict on Counts I, II, III, and V in Civil No. 73-646-Y, for the plaintiff corporation in the amount of $115,584.00 was in error and must be set aside.

Had the charter been revived and evidence of such revival been presented to the jury before the case went to them, the difficulties of interpreting section 85(d) would have been thrust upon this Court. Absent any evidence from the plaintiff on the capacity question and given the defendants' strong evidence to the contrary, the effect of revival is of academic interest only, because the crucial issue is whether the plaintiff carried its burden of proof on the capacity issue to get the point to the jury. The record clearly establishes that it did not, post-trial revival or no.

Chrysler Credit and Chrysler Motors also move for a new trial in Civil No. 73-646-Y. The Court finds no merit in their motions, and they will be denied.

Pursuant to Fed. R. Civ. P. 59(e), Chrysler Motors and Credit have moved to have the judgment entered in Civil No. 73-646-Y amended to show more clearly that Motors prevailed on Counts II, IV, and VI, and that Credit was the prevailing party as to Counts I, IV, V and VI. Each also asks that it be awarded costs as the prevailing party on these counts. Their motions will be granted insofar as clarification is sought. The awarding of cost is governed by Fed. R. Civ. P. 54(d) which gives the Court discretion, *see* 10 C. Wright & A. Miller, Federal Practice and Pro-

cedure, Civil §2668, at 139 (1973), but establishes the policy that costs "shall be allowed as a matter of course to the prevailing party" unless the Court directs otherwise. A party who has obtained some relief usually will be regarded as the prevailing party even though he has not sustained all of his claims. *See Sperry Rand Corp.* v. *A-T-O, Inc.*, 58 F.R.D. 132, 135 (E.D. Va. 1973); 10 C. Wright & A. Miller, *supra* §2667, at 129 n.8 and accompanying text. Under this standard, Marvin Greenfield is a prevailing party in Civil No. 73-646-Y insofar as Credit and Motors are concerned. Costs were awarded to defendants Chrysler Corporation, Chrysler Realty, Chrysler Leasing and Chrysler Financial, because, as to those defendants, plaintiff did not prevail on any count. Similar reasoning dictates the award of costs to Motors and Credit as to Superior Dodge in light of this Court's decision herein granting judgment notwithstanding the verdict to Motors and Credit as to Superior Dodge.

Motors and Credit have also offered motions requesting the Court to enter an express determination, in accordance with Fed. R. Civ. P. 54(b), that, as to those counts which have been tried, there is no just reason for delay in entering a judgment on which appeal can be had. Such an order is necessary because, although separate trials have been ordered by virtue of this Court's order of November 18, 1974, severing Counts VII-IX of Civil No. 73-646-Y, that does not affect the finality of the judgment entered following each separate trial for purposes of Rule 54(b). *See* 10 C. Wright & A. Miller, *supra*, §2656, at 40 n.48 and accompanying text. Absent the appropriate finding pursuant to Rule 54(b), there is no appealable final judgment at this stage in the proceedings.

Plaintiffs apparently do not oppose such a certification. Without dwelling on the matter, the claims which have now been decided are left in a posture that satisfies the prerequisities of Rule 54(b). *See id.* §§2655-57, 2659-62. Therefore this Court will direct entry of judgment as to Counts I-VI in Civil No. 73-646-Y and enter its determination that there is "no just reason for delay."

For the reasons stated, it is this 15th day of May, 1975, by the United States District Court for the District of Maryland, ORDERED:

1. That the motion of defendant Superior Dodge, Inc., and counter-defendants Marvin and Betty Greenfield for judgment notwithstanding the verdict, or, in the alternative, a new trial in Civil No. 70-1396-Y be, and the same is, hereby denied;

2. That the motions of defendants Chrysler Credit Corporation and Chrysler Motors Corporation for judgment notwithstanding the verdict in Civil No. 73-646-Y, insofar as those motions challenge the capacity of Superior Dodge, Inc., to sue, be, and the same are, hereby granted;

3. That all other aspects of the Chrysler Credit and Chrysler Motors motions for judgment notwithstanding the verdict and for a new trial on Civil No. 73-646-Y be, and the same are, hereby denied;

4. That the motions for Fed. R. Civ. P. 54(b) certification as to Counts I-VI in Civil No. 73-646-Y of defendants

Chrysler Credit and Chrysler Motors be, and the same are, hereby granted; and

5. That the motions of Chrysler Credit and Chrysler Motors to amend the judgment entered in Civil No. 73-646-Y be, and the same are, hereby granted, the entered judgment to read as follows:

Order

The above entitled case came before the Court with Civil No. 70-1396-Y on November 18, 1974, for the purpose of trial; on November 18, 1974, an Order was filed by the Court severing Count Nos. VII, VIII, and IX of the Complaint for separate trial subject to further proceedings; on December 5, 1974, at the conclusion of the plaintiffs' case-in-chief, Motions were filed by the defendants for a Directed Verdict, and after hearing argument of counsel for the respective parties, said Motions were granted by the Court as to defendants Chrysler Corporation, Chrysler Realty Corporation, Chrysler Leasing Corporation and Chrysler Financial Corporation, and were denied by the Court as to defendants Chrysler Motors Corporation and Chrysler Credit Corporation; on December 16, 1974, at the conclusion of all the evidence, Motions were filed by all parties for a Directed Verdict, and after hearing argument of counsel for the respective parties, said Motions were granted in part and denied in part by the Court; on December 18, 1974, at the conclusion of all the evidence, argument of counsel for the respective parties and the Court's Charge to the Jury, the case was submitted to the

Jury for their consideration in the above entitled case as to the defendant Chrysler Motors Corporation as to Count Nos. I, II, III, V, and VI of the Complaint, as to compensatory damages only, and as to defendant Chrysler Credit Corporation as to Count Nos. II, III, V, and VI of the Complaint, as to compensatory damages only, and after deliberating, the Jury returned verdicts in favor of plaintiffs against defendant Chrysler Motors Corporation on Counts I, III, and V and against defendant Chrysler Credit Corporation on Counts II and III; the Jury returned verdicts in favor of defendant Chrysler Motors Corporation against plaintiffs on Counts II and VI and in favor of defendant Chrysler Credit Corporation against plaintiffs on Counts V and VI; defendants Chrysler Motors Corporation and Chrysler Credit Corporation filed motions for judgment notwithstanding the verdict which were granted as to the Jury's verdict in favor of plaintiff Superior Dodge, Inc.; therefore, it is this 15th day of May, 1975, by the United States District Court for the District of Maryland,

(A) Expressly determined, pursuant to Fed. R. Civ. P. 54(b), that there is no just reason for delay in entering final judgment on Counts I-VI of Civil No. 73-646-Y; and

(B) Expressly ordered and directed:

1. That judgment be, and the same is, hereby entered in favor of plaintiff Marvin H. Greenfield against defendant Chrysler Motors Corporation on Counts I, III, and V and against defendant Chrysler Credit Corporation on Counts

II and III in the amount of Three Hundred Sixty-Six Thousand, Sixteen Dollars ($366,016.00), and costs;

2. That judgment be, and the same is, hereby entered in favor of defendant Chrysler Motors Corporation against plaintiff Marvin H. Greenfield on Counts II, IV, and VI and in favor of defendant Chrysler Credit Corporation against plaintiff Marvin H. Greenfield on Counts I, IV, V, and VI;

3. That judgment be, and the same is, hereby entered in favor of defendants Chrysler Credit Corporation and Chrysler Motors Corporation against plaintiff Superior Dodge, Inc., with costs, on Counts I-VI; and

4. That judgment be, and the same is, hereby entered in favor of defendants Chrysler Corporation, Chrysler Realty Corporation, Chrysler Leasing Corporation, and Chrysler Financial Corporation against plaintiffs Superior Dodge, Inc., and Marvin Greenfield, with costs, on Counts I-VI.

s/ JOSEPH H. YOUNG
United States District Judge

APPENDIX C

ADDITIONAL STATUTES CITED

Automobile Dealers' Day in Court Act, 15 U.S.C.:

"§1221. Definitions

As used in this chapter—

(a) The term 'automobile manufacturer' shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

(b) The term 'franchise' shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

(c) The term 'automobile dealer' shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Teritory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

(d) The term 'commerce' shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between any Territory and any State or

foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(e) The term 'good faith' shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided,* That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."

"§1222. Authorization of suits against manufacturers; amount of recovery; defenses

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling or not renewing the franchise with said dealer: *Provided,* That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith."

"§1223. Limitations

Any action brought pursuant to this chapter shall be forever barred unless commenced within three years after the cause of action shall have accrued."

Annotated Code of Maryland, Corporations and Associations §3-513 (1975) (formerly Article 23, §85 (1973 Repl. Vol.)):

"Effect of extension or revival.

The reinstatement and extension of a corporation's existence under §3-501 of this subtitle or the revival of a corporation's charter under §3-508 of this subtitle has the following effects:

(1) If otherwise done within the scope of its charter, all contracts or other acts done in the name of the corporation while the charter was void are validated, and the corporation is liable for them;

(2) All the assets and rights of the corporation, except those sold or those of which it was otherwise divested while the charter was void, are restored to the corporation to the same extent that they were held by the corporation before the expiration or forfeiture of the charter."

Annotated Code of Maryland, Courts and Judicial Proceedings §5-101 (1974):

"Three-year limitation in general.

A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced."